SUPREME COURT OF QUEENSLAND

CITATION:	*O'Connor v Toll Holdings Ltd* [2015] QSC 259
PARTIES:	**SHANE WILLIAM O'CONNOR** (applicant) **v** **TOLL HOLDINGS LTD** (respondent)
FILE NO:	SC No 7687 of 2015
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 September 2015
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2015
JUDGE:	Applegarth J
ORDER:	**1. It is declared that the decision of the respondent dated 28 May 2015 made in accordance with s 186(3) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) to have the applicant's lumbar spine injury assessed again pursuant to s 179 of the Act by Dr Day was not repealed and remains operative.** **2. It is declared that the respondent's purported decision dated 24 June 2015 to refer the applicant's lumbar spine injury to the medical assessment tribunal pursuant to s 186 of the Act was invalid.** **3. The respondent pay the applicant's costs of and incidental to Supreme Court Proceeding No 7687 of 2015 to be assessed on the standard basis.**
CATCHWORDS:	WORKERS' COMPENSATION – ASSESSMENT AND AMOUNT OF COMPENSATION – ASSESSMENT BY AGREEMENT – where applicant was injured at work – where applicant's degree of permanent impairment was assessed by a doctor and a notice of assessment issued by the applicant's insurer pursuant to the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – where applicant did not agree with the assessment and requested a further assessment by a doctor he nominated – where insurer agreed to the reassessment – where insurer later requested the applicant give to reasons for his disagreement with the original

	assessment to enable it to consider whether a further assessment by a doctor was necessary or whether it should be referred to the medical assessment tribunal – where applicant contested need to provide reasons – where insurer then purported to refer applicant's case to medical assessment tribunal – whether insurer repealed its decision to refer the reassessment to another doctor within the required 10 day period
	Acts Interpretation Act 1954 (Qld), s 24AA *Workers' Compensation and Rehabilitation Act* 2003 (Qld), ss 179, 185, 186
COUNSEL:	G R Mullins and M Black for the applicant D J Kelly for the respondent
SOLICITORS:	Maurice Blackburn Lawyers for the applicant Rodgers Barnes and Green for the respondent

[1] The applicant was injured at work. His solicitors requested that his injuries be assessed to determine the degree of permanent impairment. A doctor assessed them under s 179 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), and the respondent, as insurer, gave a notice of assessment in accordance with s 185 of the Act.

[2] The applicant, through his lawyers, advised in accordance with s 186 of the Act that he did not agree with the degree of permanent impairment stated in the notice of assessment. He requested that his injury be assessed again under s 179 by another doctor, Dr Day. The procedure to have another assessment by a new doctor is contemplated by s 186, and if the insurer decides to have the worker's injury assessed again under s 179, the original notice of assessment is taken to never have been given.[1]

[3] Having received the applicant's request, the respondent acceded to it and decided to have the applicant's injury assessed again, this time by Dr Day. It booked an appointment with Dr Day for the applicant, and made arrangements for him to travel to the appointment.

[4] The respondent then had second thoughts. On 11 June 2015 it wrote to the applicant as follows:

> "I refer to your solicitor's letter of 27/05/15 in relation to the assessment of permanent impairment for your injury and my letter of 01/06/15 with appointment details for Dr Day.
>
> Please be advised, upon further consideration, Toll does not, at this time agree to a further assessment under section 186 of the *Workers' Compensation and Rehabilitation Act 2003*.
>
> As such this appointment (and associated flights) has been cancelled.

[1] The Act, s 186(4).

> Please advise of the reason you disagree with the degree of permanent impairment assessed by Dr Salman so that due consideration can be given to have the injury reassessed by a doctor or referred to the Medical Assessment Tribunal for assessment.
>
> Please provide reasons by COB 19/06/15 or the matter of the degree of permanent impairment will be referred to the Medical Assessment Tribunal."

[5] On 19 June 2015, the applicant, through his solicitors, asserted that there was no requirement under the Act for him to provide reasons as to why he disagreed with the degree of permanent impairment assessed by Dr Salman.

[6] In response, on or about 24 June 2015, and outside the ten business day period referred to in s 186(3) of the Act, the respondent purported to refer the applicant's case to a medical assessment tribunal. On 24 June 2015, the respondent wrote to the applicant and advised of its decision to refer his file to the medical assessment tribunal.

[7] By his amended originating application, the applicant seeks the following declarations:

> "1. A Declaration that the decision of the Respondent dated 28 May 2015, in accordance with Section 186(3) of the *Workers' Compensation and Rehabilitation Act 2003* ("*the Act*") to have the Applicant's lumbar spine injury assessed again pursuant to Section 179 of the Act to decide the injured person's Degree of Permanent Impairment by Dr Day, was valid; and
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> 2. A Declaration that the Respondent's decision dated 24 June 2015 to refer the Applicant's lumbar spine injury to the Medical Assessment Tribunal purportedly pursuant to Section 186 of the Act was invalid."

[8] The respondent argues that whilst it originally acceded on 28 May 2015 to the applicant's request to have his injury assessed by Dr Day under s 179, it was entitled by virtue of s 24AA of the *Acts Interpretation Act* 1954 (Qld) to repeal its decision, provided it exercised the power of repeal "in the same way, and subject to the same conditions"[2] as the power to make the original decision. This required it to exercise the asserted power to repeal within 10 business days after receiving the applicant's request dated 27 May 2015. The respondent relies upon its letter of 11 June 2015 as reflecting a decision made within that period "not to have the worker's injury assessed again under s 179".[3] The applicant contests this. He submits that if a power to rescind the earlier decision exists, a decision not to have the injury assessed again under s 179 was not made within the 10 day period, which expired at 5pm on 11 June 2015.

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[2] *Acts Interpretation Act* 1954 (Qld), s 24AA(b).
[3] The Act, s 186(3) and (6(a)).

[9] Two issues arise: the first is factual, and if is resolved in the respondent's favour, a legal issue arises. The issues are:

1. did the respondent on or about 11 June 2015 decide not to have the applicant's injury assessed again under s 179, thereby repealing its decision and obliging it to refer the question of degree of permanent impairment to a medical assessment tribunal?;[4] and

2. if so, was it empowered to repeal its earlier decision to refer the assessment to Dr Day under s 179?

[10] The terms of the respondent's letter of 11 June 2015 do not support the respondent's proposition that by that time it had decided "not to have the worker's injury assessed again under s 179".[5] The letter sought information, namely reasons from the applicant as to why he disagreed with the degree of permanent impairment assessed by Dr Salman. This was so that "due consideration can be given" to have the injury reassessed "by a doctor or referred to the Medical Assessment Tribunal for assessment". The letter makes clear that as at 11 June 2015 the respondent had not decided against having the applicant's assessed again by Dr Day. It was keeping an open mind about the matter and required the applicant to provide reasons by close of business on 19 June, failing which it advised that the matter of the degree of permanent impairment "will be" referred to the medical assessment tribunal.

[11] By 11 June 2015 the respondent may have decided to cancel the appointment with Dr Day and the applicant's travel arrangements to see him. But this does not mean that it had decided not to have his injury assessed again under s 179 by a doctor, rather than referred to the medical assessment tribunal. Any decision to refer the matter to either a doctor or the medical assessment tribunal awaited the applicant's response.

[12] I conclude that if the respondent had power by virtue of s 24AA of the *Acts Interpretation Act* to repeal the decision it made and communicated on 28 May 2015, it did not decide within the required 10 business days to repeal that decision. If s 24AA conferred a power to repeal, then that power was subject to the same conditions as the power to make the original decision. It had to be made within 10 business days after receiving the applicant's request dated 27 May 2015.[6] The asserted power to repeal was not exercised within that 10 business day period. It was not exercised on or about 11 June 2015. If it had been, then the respondent would have been obliged to make a decision that day under s 186(3), and if it decided to not have the injury assessed again under s 179, it would have been obliged to refer the matter to a medical assessment tribunal. Rather than repeal its earlier decision, it awaited information which would enable it to consider whether to do this.

[13] As a consequence, the original decision of 28 May 2015 was not repealed, and the purported decision made on 24 June 2015 to refer the matter to the medical assessment tribunal was unauthorised and is invalid.

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4 The Act, s 186(6) and (7).
5 The Act, s 186(3) and (6(a)).
6 The Act, s 186(3).

[14] My determination of the factual issue makes it unnecessary to decide the legal issue of whether the respondent possessed a power to repeal a decision made under s 186(3) of the Act to have a worker's injury assessed again under s 179.

[15] The applicant has established his entitlement to declarations in a form similar to those sought. There is no discretionary reason as to why the declarations should not be made.

[16] I will hear the parties, if required, on the question of costs. My provisional view, however, is that costs should follow the event. As a result, I propose to order as follows:

1. It is declared that the decision of the respondent dated 28 May 2015 made in accordance with s 186(3) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) to have the applicant's lumbar spine injury assessed again pursuant to s 179 of the Act by Dr Day was not repealed and remains operative.

2. It is declared that the respondent's purported decision dated 24 June 2015 to refer the applicant's lumbar spine injury to the medical assessment tribunal pursuant to s 186 of the Act was invalid.

3. The respondent pay the applicant's costs of and incidental to Supreme Court Proceeding No 7687 of 2015 to be assessed on the standard basis.